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NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

CHARLES J. JENKINS,
PETITIONER

VS.

UNITED STATES OF AMERICA, ET AL.,
RESPONDENTS

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

ISSUE I

Whether the Fifth Circuit Court of Appeals erred when it affirmed the District Court's decision determining that petitioner's *Federal Tort Claim Act (FTCA)* suit for lost wages and back pay in the jurisdictional amount of $83,571.59 due to an unjustified or unwarranted personnel action pursuant to the *Back Pay Act 5 U.S.C. 5596* is really a claim for further compensation based upon petitioner's accepted emotional injury, thus, barring him from bringing his FTCA action by the exclusive remedy provision of the Federal Employees Compensation Act (FECA), even when the FECA has denied any liability for the jurisdictional amount of $83,571.59.

ISSUE II

Whether the Fifth Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceeding or sanctioned such a departure by the lower court, when the lower court decided that once respondent, U.S. Department of Labor, determined that petitioner emotional injury claim (accepted in 1990 dating back to 1980) is job related, he is barred from bringing such claims as loss of employment and discrimination by virtue of the exclusivity provision of the FECA. When in fact, all of the Circuit, along with the Fifth Circuit, and the Eastern District Court of Louisiana has well established laws to the contrary which have not been overturned.

ISSUE III

Whether the lower courts have erred when they determined that petitioner, a preference eligible, disabled Vietnam Veterans'

constitutional and civil rights claims are not actionable because petitioner failed to pursue those claims through the *Civil Service Retirement Act (CSRA)* laws pursuant to the *Bush v. Lucas* analysis based upon the proposition that all of those claims were done in an employment relationship. When in fact, petitioner, requested that his claims be addressed through the *Civil Service Reform Act (CSRA)* laws, (i.e. *20 CFR 550.801-808* back pay and *5 U.S.C. 5596 The Back Pay Act*), but respondents withheld or failed to give notice as required by the *Veterans Preference Act* and the *Bush v. Lucas* analysis. Also, probative evidence reveals that all of the prohibited personnel practices or claims did not occur during petitioner's employment relationship with the federal government.

TABLE OF CONTENTS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2, 3, 4

REASONS FOR GRANTING THE WRIT 4

CONCLUSION 30

INDEX TO APPENDICES

Appendix A Opinion of the Court of Appeals for the Fifth Circuit ..... A1 – A8

Appendix B Opinion of the District Court for the Eastern District of Louisiana ..... B1 – B5

Appendix C Court of Appeals denial of the petition for rehearing and/or rehearing en banc (issued August 15, 1995) ..... C1 – C2

Appendix D Court of Appeals denial of Stay of Mandate (issued September 22, 1995) ..... D1 – D4

INDEX TO APPENDICES (cont'd)

Appendix E Amendment V and XIV to the United States Constitution E1

Appendix F Conspiracy and Action for Neglect to Prevent 42 USCA 1985 and 1986 ..... F1–F2

Appendix G Letter of Decision or Termination G1–G3

Appendix H Medical Report dated July 17, 1980 ..... H1–H3

TABLE OF AUTHORITIES CITED

CASES Page

Ainsworth v. United States,
180 Ct. Cl. 166, 172 (1967) 23

Allan Donald McCormack v. United States,
204 Ct. Cl. 371, 372 (1974) 22

Anderson v. Creighton,
107 S. Ct. 3034 (1987) 27

Baldwin County Welcome Center v. Brown,
466 U.S. 147, 151 (1984) 19

Bivens v. United States,
8 Ct. Cl. 339, 342 (1985) 11,13

TABLE OF AUTHORITIES CITED (cont'd)

CASES — Page

Burke v. United States,
644 F. Supp 566 (E.D. LA. 1986) 18

Bush v. Lucas
103 S. Ct. 2404 (1983)..... ii,19, 29

Deford v. Secretary of Labor,
700 F.2d 281, 290 (6th Cir. 1983) 19

Figueroa v. United States,
7 F.3d 1405 (9th Cir. 1993) 26

Gates v. Georgia-Pacific Corp.,
492 F.2d 292 (CA 9 1974)..... 19,20

Gill v. United States,
641 F.2d 195 (5th Cir. 1981) 4

Grijalva v. United States,
107 S. Ct. 89 (1986)..... 25

Harlow v. Fitzgerald,
457 U.S. 800, 818-819 (1982) 8, 26

Irvin v. Veteran Administration,
498 U.S. 89 (1990) 17

Leedom v. Kyne,
79 S. Ct. 180 (1958)..... 26

TABLE OF AUTHORITIES CITED (cont'd)

CASES — Page

Lindahl v. Office of Personnel Management,
105 S. Ct. 1620 (1985) 25

Lockheed Aircraft Corp. v. United States,
460 U.S. 190 (1983). 16

Manzi v. United States,
198 Ct. Cl. 489, 495 (1972) 24

McClary v. United States,
7 Ct. Cl. 160, 162 (1984) 12

Miller v. Aldridge,
1989 WL 62503 (E.D. LA) 18,19

Montalvo v. United States,
231 Ct. Cl. 980, 982 (1982). 11

Morales v. Dep't of Army,
947 F.2d 766 (5th Cir. 1991) 29

Morelli v. United States,
161 Ct. Cl. 44, 45 (1963) 23

Newman v. United States,
143 Ct. Cl. 784 (1958) 23

Oestereich v. Selective Serv. Sys. Local Board No. 11,
89 S. Ct. 414 (1968) 26

TABLE OF AUTHORITIES CITED (cont'd)

CASES — Page

Paluca v. Secretary of Labor,
813 F.2d 524 (1st Cir. 1987) 25

Pereiva v. U.S. Postal Service,
964 F.2d 873 (9th Cir. 1992) 29

Piccone v. United States,
407 F.2d 866, 869, 186 Ct. Cl. 752, 759 (1969) 23

Robert v. Secretary of Labor,
108 S. Ct. 328 (1987). 25

Rodrigues v. Donovan,
769 F.2d 1844 (9th Cir. 1985) 26

Shiflett v. U.S. Postal Service,
839 F.2d 669 (5th Cir. 1988) 20,21, 22

Siegert v. Gilley,
111 S. Ct. 1789 (1991) 27

Shubinsky v. United States,
488 F.2d 1003, 1006 (1973) 22,23

Staacke v. U.S. Secretary of Labor,
841 F.2d 278, 281 (9th Cir. 1988) 7,25,26,28

Sullivan v. United States,
428 F. Supp. 79, 81 (E.D. Wis. 1977) 19

Taylor v. Garrett,
820 F. Supp. 923, 937-939 (E.D. PA 1993) 10

TABLE OF AUTHORITIES CITED (cont'd)

CASES — Page

United States v. Connolly,
716 F.2d 882, 887 (Fed. Cir. 1983) 12

United States Constitution,

Fifth Amendment 2

Fourteenth Amendment 2, 9, 20

STATUTES

United States Code

Title 5, Section(s) 5596 Et. Seq. i,ii,2,4,6,12,13,15

Title 5, Section(s) 7701. 19

Title 5, Section(s) 8101 Et Seq. 2, 12,18

Title 5, Section(s) 8106(c)(2) . ..... Passim

Title 5, Section(s) 8128(b) 24

Title 28, Section(s) 1254(1) 2

Title 28, Section(s) 1346(b). 2, 4

Title 28, Section(s) 1491 2,12,13,23

Title 28, Section(s) 2671 Et Seq. 2

STATUTES CITED (cont'd)

United States Code

Page

Title 28, Section(s) 2675(a) 23

Title 39, Section(s) 1001-1011, 1201-1209 29

Title 42, Section(s) 1981 19

Title 42, Section(s) 1985-86 ..... 2, 28

RULES

Fed. R. Civ. P. 23 30

Fed. R. Civ. P. 38 B 29

Sup. Ct. R. 15.2. 29

REGULATIONS

5 CFR 353.308 A 21

5 CFR 550.801-808 ..... ii,2,13,14,16

5 CFR 1201.21 21

20 CFR 10.1 B 13

REGULATIONS CITED (cont'd)

REGULATIONS	Page
20 CFR 10.123	8, 27
28 CFR 14.2 B 2	14,15

OTHER

Joint Department of Labor/U.S. Postal Service
Rehabilitation Program Implementing Guidelines 8

NO. _____

IN THE SUPREME COURT
OF THE
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OCTOBER TERM, 1995

CHARLES J. JENKINS,
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vs.

UNITED STATES OF AMERICA, ET AL.,
U.S. POSTAL SERVICE,
U.S. DEPARTMENT OF LABOR AND
U.S. POSTAL SERVICE SUPERVISOR
BARRY J. TAQUINO
RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit in this case has been determined to have no precedential value and therefore is not published in any reporter pursuant to local rule 47.5 as ordered by the court and is attached in appendix A to this petition. The opinion of this case for the Court of the Eastern District of Louisiana appears in appendix B.

JURISDICTION

The Court of Appeals' opinion in this matter was filed on June 20, 1995. A timely petition for suggestion of rehearing and/or rehearing en banc was filed on July 5, 1995. The Court of Appeals' denial of the petition for suggestion of rehearing or rehearing en banc was issued on August 15, 1995 and is set forth in appendix C. This court's jurisdiction is invoked under Title 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth and Fourteenth Amendments to the United States Constitution, The Federal Tort Cla ms Act 28 U.S.C. 2671 et seq., Conspiracy and Action for Neglect to Prevent 42 USCA 1985-86, United States as Defendant 28 U.S.C. 1346(b), Partial Disability 5 U.S.C. 8106(c)(2), Back Pay 5 CFR 550.801-808, The Back Pay Act 5 U.S.C. 5596, The Tucker Act 28 U.S.C. 1491 and Federal Employees' Compensation Act (FECA) 5 U.S.C. 8101 et seq.

STATEMENT OF THE CASE

Petitioner, Charles J. Jenkins, was hired as a letter carrier by the U.S. Postal Service in 1972 with the status of a preference eligible disabled Vietnam veteran. In 1974 petitioner sustained an on the job knee injury and in 1979 he had subsequent knee surgery. Petitioner could not return to his position as a letter carrier and was assigned to a clerk position in 1980 working the evening shift from 5:00 p.m. to 1:30 a.m. In 1982 petitioner was offered a permanent modified distribution clerk position with a tour of duty from 9:30 p.m. to 6:00 a.m. Petitioner was told that he had to accept this job offer or file for disability retirement through the Office of Personnel Management and that should he

not elect to accept the limited duty position of modified distribution clerk further injury compensation benefits may be jeopardized and [your] position with the Postal Service will be terminated. (see petitioner's memorandum in opposition of defendant's motion to dismiss exhibit O job offer dated March 15, 1982).

Petitioner accepted the modified distribution clerk job and appealed its suitability to the Merits System Protection Board (MSPB), but the appeal was dismissed for lack of jurisdiction because he was given erroneous appellate rights to appeal the suitability of the job offer to the MSPB. Petitioner was again given the wrong appellate rights when he was told by respondent, Injury Compensation Supervisor, Barry J. Taquino, to appeal the job offer suitability to the Equal Employment Opportunity (EEO). Nevertheless, petitioner worked in this modified distribution clerk job until August 14, 1987 when he was terminated for a second time and up to this date he has not had the opportunity to address the suitability of that job offer as required by *5 U.S.C. 8106(c)(2)*. As a result, the petitioner lost substantial wages and back pay during the period from 1980 to 1990. Some of the lost wages was attributable to the Federal Employees' Compensation Act (FECA) and the other lost wages and back pay are attributable to the unwarranted or unjustified personnel action.

In October 11, 1990 when the Department of Labor accepted petitioner's emotional injury as compensable it related back to 1980 when petitioner was first assigned to do clerk work. The FECA reimbursed the petitioner for the lost wages that were compensable and covered by medical documentation. However, there is some $83,571.59 in lost wages and back pay that are due to an unwarranted or unjustified personnel action during the period from 1980 to 1987 that have never been paid to petitioner. Those are the lost wages and back pay attributable to the intermittently lost hours in which the petitioner did not work, but

should have been "... deemed to have performed service for the agency during that period." pursuant to *5 U.S.C. 5596(b)(2).*

Petitioner was coerced to accept and work in a job that was never determined to be suitable. The net result was a violation of a clear statutory mandate pursuant to *5 U.S.C. 8106(c)(2)* of which is the subject in part of this lawsuit. The United States District Court, Eastern District of Louisiana had jurisdiction pursuant to *Title 28 U.S.C. § 1346.*

REASON FOR GRANTING THE WRIT

Certiorari should be granted in this case because the United States Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court as to call for an exercise of this court's power of supervision.

Arguments To Issue I

The Fifth Circuit Court of Appeals said in its decision at 5, (see appendix A) that petitioner:

> ... pursued a FECA remedy for his on-the-job emotional injury and received compensation for this claim. In his complaint, he seeks further compensation for this injury, alleging that he had been subject to harassment, humiliation, and improper discipline. However, the Secretary of Labor's determination that Jenkins's emotional injury falls within the ambit of the FECA is expressly "unreviewable by this or any other court." *Gill, 641 F.2d at 197.* Thus Jenkins is barred from bringing this FTCA action by the exclusive remedy provision of the FECA.

First of all, in petitioner's suggestion for rehearing or rehearing en banc at 2 he concede that his emotional injury claim which has been accepted by the FECA bars any FTCA claim for that injury. But when respondents says that petitioner's claim of $83,571.59 is a claim for "further compensation for this injury..." (Appeal Court decision appendix A at 5) is nothing further from the true facts of this case. This petitioner will explain again, for the purpose of this court, as he has contended throughout the life of this claim why and how he is entitle to the $83,571.59.

When respondent, U.S. Department of Labor, accepted petitioner's emotional injury claim in November 1990, the period of coverage dated back to 1980. Petitioner had substantial lost wages during this period and was actually reimbursed with compensation by the U.S. Department of Labor in the amount of $40,858.94 in addition to a reimbursement of $32,435.53 of disability retirement payment to the Office of Personnel Management (OPM) for the period from 1987 to 1990.

The FECA also, conceded to petitioner's request to reimburse him with compensation for the period from 1980 to 1987 and petitioner did receive compensation of approximately $400.00 for those absences from work that were covered during the period by medical substantiations due to his job related injury. (see petitioner's memorandum in opposition Exhibit D letter of U.S. Department of Labor dated April 19, 1991). However, during the same period (i.e. 1980 to 1987), petitioner suffered an additional amount of lost wages and benefits to the sum of $83,571.59 that was not covered by the FECA. (see exhibit D, H, J and M). Id.

The petitioner have contended throughout his claim that the demand for his lost wages and back pay was pursuant to the

Back Pay Act 5 U.S.C. 5596(b)(1)(2)[1]. The petitioner has proffered probative evidence to show that he did in fact suffer those lost wages and back pay (i.e. $83,571.59) during the period 1980-1987. This sum certain is not a phantom number the petitioner pulled out of a hat. It can easily be verified through a payroll audit, but since there was no discovery the petitioner relied upon his personal payroll records. For instance, the $83,571.59 sum certain was computed by Ralph C. Cox Jr., a Certified Public Accountant with the firm of Bourgeois, Bennett, Thokey and Hickey. The source of the figures Mr. Cox used to make his computation was gleaned from petitioner's PS Form 1223 or check stubs ranging from 1980 to 1987, and the applicable IRS interest rate for the periods covered. (see exhibit K in global letter of James C. Cox Jr. dated July 29, 1991 – summary claim for compensation and interest) Id.

Assuming arguendo, that there is prima facie evidence that $83,571.59 in lost wages and benefit was suffered by the petitioner during the period 1980-1987, the following questions would be whether petitioner is entitled to those lost wages and back pay, and if so, who is liable? The petitioner contend that he should be made whole for his lost wages and back pay because of the following reasons.

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[1] *5 U.S.C. 5596(B)(1)(2)* — (B) An employee of an agency who, on the basis of an administrative determination or a timely appeal, is found by appropriate authority under applicable law or regulation to have undergone an unwarranted or unjustified personnel action that has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differential of the employee — (1) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect an amount equal to all or any part of the pay, allowance, or differential, as applicable, that the employee normally would have earned during that period if the personnel action had not occurred, less any amounts earned by him through other employment during that period; and (2) for all purposes, is deemed to have performed service for the agency during that period except that ...

The sum certain claim for lost wages and back pay is a direct result of the unjustified or unwarranted personnel action perpetrated upon the petitioner during the same period as petitioner emotional injury claim dated from 1980 to 1990. Specifically, in April of 1982, respondent, Injury Compensation Supervisor Barry J. Taquino, made petitioner an offer of employment for the second time. The first job offer (i.e. January 1982) was withdrawn by respondent, Taquino, because he said it was too onerous. The second job offer from respondent, Taquino, inter alia, gave the petitioner erroneous appellate right to appeal the suitability of the job offer.

Evidence of record reveals that one of the unjustified or unwarranted personnel action occurred when respondent, U.S. Postal Service, executed PS Form 50-A[2] to change petitioner from the letter carrier craft to the clerk craft as per the job offer from respondents, U.S. Postal Service and Injury Compensation Supervisor, Taquino. (see record excerpt of plaintiff-appellant tab 15 in global letter dated April 8, 1982). Now, the reason why the personnel action is unjustified/or unwarranted is because, in spite of petitioner working in the job from 1982 to 1987 after which he was terminated for a second time the job was not suitable for him and was never determined to be suitable as required by statute *5 U.S.C. 8106(c)(2).*

As such, the respondents are guilty of a clear statutory mandate according to *Staacke v. U.S. Secretary of Labor, 841 F.2d 278, 281 (9th Cir. 1988).* Specifically, this statute *5 U.S.C. 8106(c)(2)*[3]

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[2] PS Form 50-A (Request for Personnel Action) The Form-A is used for all future action on the employee. Postal Manual-Personnel Operation, Personnel Series Handbook P-11 611.234 (1983).

[3] *5 U.S.C. 8106(c)(2)* — (c) A partially disabled employee who – (2) refuses or neglects to work after suitable work is offered to, procured by, or secured for him; is not entitled to compensation.

is now as it was in 1982 when respondent, Taquino, made the job offer. See also *20 CFR 10.123 (1982) footnote 5 infra* and *Harlow v. Fitzgerald, 457 U.S. 800, 818-819 (1982).* The operative word is suitability, and the respondent, Injury Compensation Supervisor, Taquino knew or should have known where the appropriate appellate right lied with respect to the suitability of the job offer he made to petitioner in April of 1982. Moreover, it was his duty as the Injury Compensation Supervisor to advise petitioner where to appeal the suitability of the job offer, yet on two occasions respondent, Taquino, gave the petitioner erroneous appeal rights for the suitability of the job offer. (see record excerpt of plaintiff-appellant tab 9 U.S. Postal Service letter dated July 23, 1982).

We know now, that, pursuant to *The Joint Department of Labor/U.S. Postal Service Rehabilitation Program Implementing Guidelines 1979-85 Chapter 6(c) Injured Worker's (IW's) Due Process Consideration* (see petitioner's Appeals Court brief pp.16-21) respondent, Injury Compensation Supervisor, Taquino, should have sent a copy of the job offer to the U.S. Department of Labor at the same time informing petitioner to appeal the job offer suitability to the U.S. Department of Labor which did not happen. The U.S. Department of Labor said in a November 12, 1987 compensation order that:

> On January 7, 1982 the claimant was offered the limited duty position permanently. Even though, no signed statement was ever received, the claimant has been working this job so one may reasonably assume the claimant accepted the job offer.

(see record excerpt of plaintiff-appellant tab 12 compensation order-memorandum to the director at 1). Petitioner contend that the U.S. Department of Labor cavalier attitude toward the suitability determination of the job offer was extremely inappro-

priate and once they knew a job offer had been presented to petitioner, (as previously mentioned Id.) respondent, U.S. Department of Labor had an obligation (sua sponte) to determine the job suitability as required by *5 U.S.C. 8106 (c)(2).* In fact, respondent, U.S. Department of Labor, admits to ignoring the statute by saying that:

> Appellant's contention that the Office did not verify the suitability of the limited-duty job offered in March 1982 is ...[irrelevant]... and regardless of whether the Office did or did not follow its suitable work procedures, as in effect in 1982, appellant, as heretofore noted, accepted the limited duty position and worked in that position for four years before stopping work and claiming disability compensation.

(see petitioner's memorandum in opposition to defendant's motion to dismiss exhibit S Employees' Compensation Appeal Board decision p.6 dated January 31, 1990). This statutory transgression resulted in a violation of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.

As petitioner has contended at the outset of his claim that respondent, Taquino, formulated this job offer with the specific intent for it to have an adverse impact upon the petitioner. Specifically, because of his position as Injury Compensation Supervisor he was privy to the petitioner's medical records, as such, he had prior knowledge by way of a July 17, 1980 medical report from Dr. A.N. Diodene Jr., an associate in the office of Dr. James William, petitioner's attending physician at that time, addressed to respondent, Taquino, indicating that the petitioner had a problem coping with the night shift (i.e. 5:00 p.m. to 1:30 a.m.) see appendix H medical report dated July 17, 1980. In 1982

the date of the job offer, respondent, Taquino intentionally exacerbated the situation by making the tour of duty for the job offer from 9:30 p.m. to 6:00 a.m. see petitioner's mem. in opp. exhibit O job offer dated March 15, 1982.

It was certainly respondent, Injury Compensation Supervisor, Taquino's duty to formulate job offers for ill or injured employees with on the job injuries such as the case with the petitioner despite Taquino's vacillation (see record excerpt of plaintiff-appellant tab 14 EEO affidavit A p.2 dated 2-5-85). But why did respondent, Taquino, choose to withhold the appropriate appellate rights from the petitioner with respect to said job offer? As petitioner has previously stated in his memorandum in opposition of defendant's motion to dismiss footnote 10 p.11 citing *Taylor v. Garret, 820 F. Supp. 933, 937-939 (E.D. PA 1993)* the Court said that:

> ...If one were to accept the Navy's rigid definition of the position in question an employer who choose to reassign to light duty work an employee who has become unable to perform his original job would have an unsettling carte blanche power over that employee. During the period of the handicapped worker's light duty employment, the employer would be able, without any sanction under the Rehabilitation Act, to harass that worker because of his handicap, fail reasonably to accommodate that workers disability, or otherwise engage in handicap-based discrimination simply because the employee was not qualified for a position that had nothing to do with his current work. This result is particular egregious where, if plaintiff's contentions are to be believed PNSY's temporary light duty placement system is itself

> designed to harm disabled workers, and disabled workers such as Taylor, who are forced to accept offer of suitable employment in order to remain eligible for worker's compensation benefits, return to PNSY to encounter inadequate accommodation of their disabilities within their light duty assignments and a hostile work environment.

By analogy, if respondents, Taquino and U.S. Department of Labor are excused from their obligatory duties to inform petitioner of his appropriate appellate rights and determine the job offer suitability, in effect denying him due process, then petitioner would suffer the same fate as previously mentioned in *Taylor v. Garrett,* supra. And in fact petitioner was forced to accept the job, suffered handicap discrimination, a hostile work environment, lost substantial wages and benefits while trying to perform that job, have not been made whole, could not work on certain days because of his job related injuries, was terminated from that job which was not suitable for him and was never determined to be suitable as required by *5 U.S.C. 8106(c)(2).* see U.S. Postal Service letter of decision or termination dated August 5, 1987 appendix G.

Since the statute *5 U.S.C. 8106(c)(2)* has been transgressed as a result of respondents failure to determine the job offer suitability, petitioner is able to invoke the *Back Pay Act* jurisdiction because of this statutory violation. In *Bivens v. United States, 8 Ct. Cl. 339, 342 (1985):*

> The Court of Claims has noted that because the *Back Pay Act* is merely derivative in its application, it "does not, in and of itself authorize a suit in this court." *Montalvo v. United States, 231 Ct. Cl. 980, 982 (1982).* Rather, for this court to acquire jurisdiction under the *Back Pay Act*, the aggrieved

> party must demonstrate that the alleged "unjustified or unwarranted personnel action" specified in the *Back Pay Act* violated a statute or regulation covered by the *Tucker Act.* See *United States v. Connolly, 716 F.2d 882, 887 (Fed. Cir. 1983); McClary v. United States, 7 Ct. Cl. 160, 162 (1984).*

Because petitioner has presented prima facie evidence that the benefit he is claiming (i.e. $83,571.59) were actually lost during a period of employment (i.e. 1980-87) that is attributed to an unjustified or unwarranted personnel practice pursuant to *5 U.S.C. 5596* and not a claim for additional monies based upon petitioner emotional injury claim, he can now invoke the *Back Pay Act* jurisdiction based upon the violation of the statute or regulation (i.e. *5 U.S.C. 8106(c))* which is covered by the *Tucker Act 28 U.S.C. 1491* which will be discussed further in this petition when petitioner address his constitutional and civil rights claims. The remaining question appear to be, who or what governmental agency(s) or agent(s) is responsible or liable for the reimbursement of the lost wages and benefits?

The FECA emphatically denies any liability for the lost wages and benefit i.e. $83,571.59, (see petitioner's memorandum in opposition to defendants' motion to dismiss exhibit F, H and J U.S. Department of Labor letters dated October 11, 1991, October 30, 1991, and November 21, 1991). The FECA said that petitioner has already been compensated for all periods of entitlement... There is no medical evidence to support any other dates of absence from work. And that interest on compensation is not allowable under the act. (exhibit H and J). Id.

However, when petitioner made his initial demand to respondent, U.S. Department of Labor (exhibit C plaintiff letter dated April 15, 1991 Id.) it was pursuant to *5 U.S.C. 8101 et seq.,*

20 CFR 10.1 B, 28 USCA 1491 and *5 USCA 5596.* Petitioner's second demand to respondent, U.S. Department of Labor (see exhibit E plaintiff letter dated July 30, 1991 Id.) contained a sum certain (i.e. $83,571.59) and specifically informed respondent, U.S. Department of Labor, again that his claim was pursuant to the *Tucker Act 28 U.S.C. 1491* and the *Back Pay Act 5 U.S.C. 5596.*

When respondent, U.S. Department of Labor, made its attempt to compensate petitioner in November 1990 for all periods of entitlement, dating back to 1980 for petitioner's emotional injury claim, it was able to discern petitioner's entitlement for compensation from those periods that were covered by medical evidence supporting the dates of absence from work and those periods of absence from work that were not covered by medical evidence, e.g. some $83,571.59 of which respondent, U.S. Department of Labor, refuse to pay. (see exhibit F U.S. Department of Labor letter dated October 11, 1991 Id). Petitioner replied in its July 30, 1991 letter (see exhibit E Id.) that pursuant to the *Back Pay Act 5 U.S.C. 5596(B)(1)(A)*— [He] is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect— therefore, petitioner did not have to medically substantiate each and every date claimed. However, that contention felled upon deaf ears. Additionally, by petitioner letter dated November 13, 1991 (see exhibit I Id.) authored by petitioner former attorney, Ernest Lee Caulfield, respondent, U.S. Department of Labor, was advised as to the regulation and case law to support petitioner's claim. Namely, *5 CFR 550.803* which is a codification of the *Back Pay Act 5 U.S.C. 5596* and *Bivens v. U.S., 8 Ct. Cl. 339 (1985)* that contention fell upon deaf ears also.

Nonetheless, a pivotal question arises, as to, when respondent, U.S. Department of Labor, attempted to reimburse the petitioner for his emotional injury claim for the period 1980-1990, should they have corrected or direct the correction of the

unjustified or unwarranted personnel action within the meaning of an agency or an appropriate authority pursuant to *5 CFR 550.803* since both incidents happened during a period concurrent with one another (i.e. unjustified or unwarranted personnel action 1980-1987 and emotional injury 1980-1990). Respondent, U.S. Department of Labor, has disavowed any liability for the lost wages and benefit, (i.e. $83,571.59). One may deduce that respondent, U.S. Department of Labor, either was derelict in its duties or does not fit the meaning of an agency or appropriate authority in the case at bar to correct or direct the correction of an unjustified or unwarranted personnel action pursuant to *5 CFR 550.803.* This is a question of law that the Courts should have decided before a summary judgment was sustained.

Nevertheless, this petitioner has to address the situation as it happens. It happens that respondent, U.S. Department of Labor, did not correct or direct the correction of the unjustified or unwarranted personnel action when it accepted petitioner's emotional injury claim for the period 1980-1990, nor did respondent, U.S. Department of Labor, advise petitioner as to what agency he should address his claim since they were absolutely sure that petitioner claim for $83,571.59 was in no way applicable to the FECA. Moreover, respondent, U.S. Department of Labor, had an obligation to give notice when it determined that the claim petitioner had made to its agency for $83,571.59 was misplaced, but no notice was ever received by the petitioner.

As previously stated in petitioner's memorandum in opposition Footnote 8 P.8 according to the *Attorney General Rules 28 CFR 14.2(b)2:*

> When more than one federal agency is or may be involved in the events giving rise to the claim, an agency with which the claim is filed shall contact

> all other affected agencies in order to designate the single agency which will thereafter investigate and decide the merit of the claim. In the event that an agreed upon designation cannot be made by the affected agencies, the Department of Justice shall be consulted and will thereafter designate an agency to investigate and decide the merit of the claim. Once a determination has been made, the designated agency shall notify the claimant that all future correspondence concerning the claim shall be directed to that federal agency. All involved federal agencies may agree either to conduct their own administrative review and to coordinate the results or to have the investigations conducted by the designated federal agency, but, in either event the designated federal agency will be responsible for the final determination of the claim.

By virtue of petitioner's claim made to respondent, U.S. Department of Labor, (see exhibit E plaintiff letter dated July 30, 1991 Id.) they were put on notice that more than one federal agency was involved, namely the *U.S. Department of Labor, U.S. Postal Service* and the *Office of Personnel Management* pursuant to *5 U.S.C. 5596.* Due to lack of discovery it is unclear whether respondent, U.S. Department of Labor, "...contacted all other affected agencies in order to designate the single agency which will thereafter investigate and decide the merit of the claim..." However, it is clear that petitioner was not notified as to who was the designated agency responsible for the final determination of the claim, and was not notified as to where to forward all future correspondence concerning his claim in violation of *28 CFR 14.2(b)2.* This is the first crucial instance of petitioner's contention based upon lack of notice. Should respondent, U.S. Department of Labor, be sanctioned for such a violation or should it be considered a harmless error? The Courts

evidently decided this was harmless error since summary judgment was sustained in favor of respondents.

In sum, the evidence clearly shows that the $83,571.59 claim made to respondents by petitioner is not a claim for further compensation based upon his emotional injury but in fact are actual lost wages and back pay that petitioner suffered during the same period as his emotional injury claim and he have not been made whole. Since the FECA has disavowed any liability for the lost wages and back pay due petitioner, then the FECA does not apply and thereby negating the FECA exclusivity provision. FECA is the exclusive remedy for injuries to federal employees falling within its coverage or the Secretary determine that the injury is within coverage of the FECA. *Lockheed Aircraft Corp. v. United States, 460 U.S. 190 (1983).* Here, respondent, Secretary of Labor, has emphatically denied any liability for the sum certain (i.e. $83.571.59).

Therefore, this Court has the authority within the meaning of *5 CFR 550.803* in the instant case to correct or direct the correction of the unjustified or unwarranted personnel action.

ARGUMENT TO ISSUE II

Petitioner contends that when respondents, U.S. Department of Labor and U.S. Postal Service refused to make him whole by not reimbursing him his lost wages and back pay in the amount of $83,571.59 he had no other alternative but to resort to the courts absent any notice from respondents to address his claim to the CSRA. Once petitioner became involved in the court system, that opened the door to address his discrimination and loss of employment claims. Respondent alleges that petitioner's:

> Vague claim of discrimination is brought for the first time on appeal in this case, and he is barred

> from bringing it at this juncture. There is nothing in the record of this case indicating that Mr. Jenkins ever exhausted his administrative remedies with regard to any claim of discrimination, with the exception of a 1982 EEO complaint about his reassignment; any complaint regarding the 1982 issue is untimely.

Appeals Court brief for defendant-appellee p.6.

This could have been easily remedied by an amendment which petitioner has requested from the lower courts but to no avail. This honorable court may see fit to allow the petitioner to amend his complaint in the district court in order that he may not only add an indispensable or necessary party (i.e. Office of Personnel Management (OPM)) but also, allow petitioner to aver his discrimination and loss of employment claims. Especially, when the evidence reveals that respondent, Taquino, had induced and tricked the petitioner by his misconduct.

Petitioner contend that the doctrine of equitable tolling is applicable in the case at bar. In respondent's Appeals Court brief at 10, respondents cite *Irvin v. Veterans Administration, 498 U.S. 89 (1990)* to buttress its case but this citation is misplaced by respondent. However, it is apropos for the petitioner case which states that:

> Federal Courts have typically extended equitable relief only sparingly. We have allowed equitable tolling in situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass. We have generally been

> much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal right.

Again, petitioner has been diligent in his quest to preserve his legal rights, however, respondent, Barry J. Taquino, tricked petitioner on two occasions with regard to advising petitioner of his appeal rights to determine the job offer suitability. As a result, petitioner was discriminated against and terminated from a job that was never determined to be suitable as required by *5 U.S.C. 8106(c)(2)*. Most certainly a case can be made for loss of employment and discrimination with equitable tolling in mind.

The Fifth Circuit Court affirmed the District Court decision pertaining to the exclusivity provision of the FECA. The District Court relied on *Burke v. United States, 644 F. Supp 566 (E.D. LA 1986)* (see decision of the U.S. District Court section C appendix B). *Burke* was the Postmaster of New Orleans, LA whose emotional injury claim was his exclusive remedy thereby negating his FTCA claim. However, close scrutiny of *Burke's* case file reveals that *Burke* was allowed by the U.S. District Court for the Eastern District of Louisiana to pursue his discrimination and loss of employment claim. *Burke* abandoned those claims because they lack merit.

In petitioner's Appeals Court brief p.5 citing *Miller v. Aldridge, 1989 WL 62503 (E.D. LA)* that court held that:

> [t]he *Federal Employees' Compensation Act (FECA), 5 U.S.C. 8101 et seq.*, does not preclude the plaintiff from pursuing a damage claim against her employer for discriminatory acts. FECA is a workers' compensation statute and the type of injuries which are covered by the Act and for

> which the Act is the defendant's exclusive remedy do not include "such claim as... for discrimination, mental distress, or loss of employment." *Sullivan v. United States, 428 F. Supp 79, 81 (E.D. Wis 1977); Deford vs. Secretary of Labor, 700 F.2d 281, 290 (6th Cir 1983).* The plaintiff's claim for damages under *42 U.S.C. 1981,* including a tort claim for mental distress as alleged, is not precluded by FECA...

Applying the elements in *Miller* to the instant case, even though petitioner's emotional injury claim maybe precluded by the exclusivity provision of the FECA, his claims of discrimination, loss of employment, lost wages and back pay should be actionable.

ARGUMENTS TO ISSUE III

Respondents' Appeals Court brief at p.11 states, "As indicated, the circumstances under which equitable tolling has been applied in federal case law are extremely narrow. In *Baldwin County Welcome Center v. Brown, 466 U.S. 147, 151 (1984),* the court examined these circumstances in detail:

> This is not a case in which a claimant has received inadequate notice, see *Gates v. Georgia-Pacific Corp., 492 F.2d 292 (CA 9 1974)..."*

And once again, this citation is best suited for the petitioner case because one of the reasons why the petitioner hold that his Constitutional and Civil Right violations should be actionable is that there was not only inadequate notice to file petitioner's claims with the CSRA laws, there was no notice at all, which is required by the *Veterans Preference Act 5 U.S.C. 7701* and in accord with the *Bush v. Lucas* analysis.

It is incongruent and a egregious violation of the equal protection clause of the *Fourteenth Amendment* to let the premise lie that respondents can cite cases in their briefs to uphold their contentions requiring strict compliance with the laws; i.e. inadequate notice. *Gates v. Georgia-Pacific Corp., 492 F.2d 292 (CA 9 1994).* But when petitioner cite the very same case to buttress his contention of no notice by respondents to address his claim under the CSRA laws, despite respondents being notified by petitioner of the existence of such claim, the Court of Appeals decides to ignore petitioner lack of notice claim. (see petitioner suggestion for rehearing en banc p. 8-11).

Although, petitioner contends that his suggestion for rehearing en banc adequately explain his lack of notice problem, here is another case that is closer on point and must be considered mandatory authority for the United States District Court for the Eastern District of Louisiana since it is a Fifth Circuit case. Specifically, the case of *Shiflett v. U.S. Postal Service, 839 F.2d 669 (5th Cir. 1988).* Like petitioner, *Shiflett* was a former postal worker. When she was denied reinstatement after recovering from an occupational illness which had resulted in her removal, the *Shiflett* court at 670 stated that:

> ...She filed a claim for compensation benefit in June 1978, with the Office of Workers' Compensation Programs of the Department of Labor (OWCP). On June 6, 1985, the OWCP awarded her a lump sum payment covering the period from July 14, 1978, the date of her removal, to January 14, 1981, the date her physician stated she would be able to work. She orally contacted Mr. Tommy Thompson, Personnel Officer of the Charlottesville Postal Service, on May 19, 1985, and requested reinstatement. Mr. Thompson denied her request, but did not mention her appeal rights to the MSPB.

> On the same day she wrote a letter to Ms. Shirley McDonald, MSC/MGR Postmaster at Charlottesville asking to be reinstated. Ms. McDonald denied the request on May 19, 1985, in a letter of that date to petitioner. In her denial letter, Ms. McDonald did not mention any appeal rights available to petitioner from the decision denying her reinstatement. In particular, the decision letter did not advise petitioner of her right to appeal to the MSPB from the agency's denial of reinstatement under *5 CFR 353.308(A),* nor did it give petitioner notice of her appeal rights to the Board as required by *5 CFR 1201.21.* In fact, the denial letter did not in any way mention a possible appeal by petitioner nor advise her how to go about it... this omission of duty by the United States Postal Service (respondent) was a violation of the regulations. Furthermore, the denial letter misled petitioner by telling her that she could not be reinstated more than three years after the separation on July 14, 1978....

To compare and contrast petitioner's case with that of *shiflett;* petitioner was terminated from his employment with the U.S. Postal Service and after he filed his occupational claim with the OWCP, he also was paid a lump sum for the period 1987 - 1990. When petitioner presented his claim to respondent, U.S. Postal Service requesting to be made whole for the lost wages and back pay for the period 1980-1987, respondent replied that petitioner's letters of demand dated October 13, 1992 and December 24, 1992 "are being forwarded to our law department for review and response." (see record excerpt for plaintiff-appellant tab 19 U.S. Postal Service letter dated December 30, 1992).

Shiflett at 673 states that:

> The critical and controlling fact in this case is not the alleged lack of diligence on the part of the petitioner, but the flagrant violation of the regulations by the respondent in failing to give petitioner notice of her appeal rights in the form and manner prescribed by the regulations at the time the denial decision was issued on May 29, 1985 or any time thereafter.

Certainly, respondent, U.S. Postal Service Law Department was aware of its duties to provide notice to petitioner with regards to addressing his monetary claim to the CSRA/Civil Service Commission/MSPB. However, as petitioner has stated in his suggestion for rehearing en banc p.6... the U.S. Postal Service took a calculated risk to gain a tactical advantage when it withheld notice, lied by for 6 months, thereafter, petitioner was compelled to file this lawsuit in accordance with *28 U.S.C. 2675(A).*

Therefore, in view of petitioner's timely letters of demand for lost wages and back pay to the appropriate agencies and notifying, in effect, that he viewed the lack of being made whole a pay dispute constituting an adverse action (An adverse action requiring the government to state in detail the various procedures available to an employee to contest the allegedly adverse action and the remedies available, such as a hearing and appeal) and the failure of the agencies to give the petitioner notice is tantamount to an abuse of discretion. *Allan Donald McCormack v. United States, 204 Ct. Cl 371, 372 (1974).*

The court in *Shubinsky v. United States, 488 F.2d 1003, 1006 (1973)* stated that:

> This Court has held the exhaustion requirement is not absolute and has exercised its discretion to entertain cases where administrative remedies have been excusably bypassed because "unusual circumstances" prevail. *Piccone v. United States, 407 F.2d 866, 869, 186 Ct. Cl. 752, 759 (1969); Ainsworth v. United States, 180 Ct. Cl. 166, 172 (1967); Morelli v. United States, 161 Ct. Cl. 44, 45 (1963).* One instance in which such circumstances are found to exist is when the preference eligible's government employer withholds information concerning plaintiff's right to appeal an adverse administrative action or affirmatively misrepresents his procedural right. See *Ainsworth v. United States, supra at 172 of 180 Ct. Cl.; Newman v. United States, supra at 799 of 143 Ct. Cl.*

Additionally, *Shubinsky v. United States at 1007* states:

> Having determined that plaintiff's failure to exhaust his administrative remedies in this instance is not fatal to his suit for judicial relief, the Court is now faced with the option of retaining the case or remanding it to the administrative agency for consideration of the merits. *Manzi v. United States 198 Ct. Cl. 489, 495 (1972); 28 U.S.C. § 1491*[4] *(Supp. II 1972)...*

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[4] *28 U.S.C. § 1491(A)(2)* — To provide an entire remedy and to complete the relief afforded by the judgment, the Court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, the Court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just...

Assuming arguendo, that this honorable court agrees with the petitioner that his failure to pursue his claim with the CSRA is not fatal to his suit for judicial relief, petitioner suggest that this court follow the holding as stated in *Manzi v. United States, 198 Ct. Cl. 489, 491 (1972) note 5* which states that:

> Where plaintiff's failure to exhaust his administrative remedy of appeal for wrongful separation to the Civil Service Commission is excusable, the offer of the Civil Service Commission, during the pendency of plaintiff's suit in this Court, to entertain an appeal out of time need not be accepted by plaintiff, however, the Court does not lose its option either to retain and adjudicate the claim or to suspend action and require plaintiff to submit his claim for administrative consideration.

The petitioner contend that even if an offer is made it is too late to unring the bell and suggest that he be given the option to decline any offer of an out of time appeal to the CSRA. In *Manzi v. United States at 501* "... The CSC offered to allow plaintiff's appeal regardless of the expiration of time allowed for the appeal, but the plaintiff declined, preferring to pursue his court remedy ...."

Moreover, other reasons why petitioner's Constitutional and Civil Rights claims should be actionable and/or reviewed by the courts are that *5 U.S.C. 8128(b)* provides:

> The action of the Secretary or his designee in allowing or denying a payment under this subchapter is (2) not subject to review by another

official of the United States or by a Court by mandamus or otherwise.

And *Staacke v. U.S. Secretary of Labor, 841 F.2d 278, 281 (9th Cir. 1988)* states that:

> The language is clear and it meaning unmistakable: Federal courts have no jurisdiction to review final judgments of the Secretary of Labor and his officers in these statutory matters, regardless of whether other, more general, statutes might seem to grant such jurisdiction. See, e.g., *Paluca v. Secretary of Labor, 813 F.2d 524, 527-28 (1st Cir), cert. denied sub nom. Roberts v. Secretary of Labor, – U.S. –, 108 S. Ct. 328, 98 L.Ed 2d 355 (1987); Grijalva v. United States, 781 F.2d 472, 474 (5th Cir.) cert. denied, – U.S. – 107 S. Ct. 89, 93 L.Ed 2d 42 (1986).*
>
> Significantly, the Supreme Court has singled out section 8128(b) as a model preclusion-of-review statute, noting the Congress uses such "unambiguous and comprehensive" language "when [it] intends to bar judicial review altogether." *Lindahl v. Office of Personnel Management, 470 U.S. 768, 779-80 & n. 13, 105 S. Ct. 1620, 1627 & n. 13, 84 L.Ed 2d 674 (1985).* While this statement in *Lindahl* is dictum, Supreme Court dicta are something the lower federal courts do not lightly ignore.
>
> Nevertheless,
>
> even where the statutory provision absolutely bars judicial review, however, there are two situations where review is nonetheless available: First, courts

> maintain jurisdiction to consider constitutional claims, see, e.g. *Rodrigues v. Donovan, 769 F.2d 1844, 1348 (9th Cir. 1985);* and, second, jurisdiction exists where defendant is charged with violating a clear statutory mandate or prohibition, *see, e.g., Oestereich v. Selective Serv. Sys. Local Bd. No. 11, 393 U.S. 233, 238-239, 89 S.Ct. 414, 416-17, 21 L.Ed 2d 402 (1968); Leedom v. Kyne, 358 U.S. 184, 188-89, 79 S.Ct. 180, 183-84, 3 L.Ed 2d 210 (1958).*

Staacke v. U.S. Dept. of Labor at 281 Id.

That being the case, jurisdiction exist in the instant case because respondents are guilty of violating a clear statutory mandate or prohibition, specifically, *5 U.S.C. 8106(c)(2).*

Petitioner contend that when respondent, Injury Compensation Supervisor, Taquino, made the job offer and failed to give him appropriate appellate rights with respect to the suitability of the job offer, he knew or should have known of those rights but intentionally withheld the proper appeal rights due petitioner. In *Figueroa v. U.S., 7 F.3d 1405, 1409 (9th Cir. 1993)* that court said:

> "[G]overnment officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 2138, 73 L.Ed. 2d 396 (1982).* In order to proceed in their suit against the individual defendants, plaintiffs must have alleged a violation of a right that was clearly established in

> 1987 at the time of the accident. *Siegert v. Gilley, 500 U.S. 226, – 111 S.Ct. 1789, 1793, 114 L.Ed. 277 (1991). Anderson v. Creighton, 483 U.S. 635, 639-40, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987).* In addition, the contours of that right "must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson, 483 U.S. at 640, 107 S. Ct. at 3039.*

Figueroa v. U.S. at 1409.

The rights to determine the suitability of the job offer was clearly established when the offer was made in 1982. [see i.e. petitioner's Appeals Court brief pp. 20-30 IW's (Injured Workers) due process consideration 1979-1985 and *20 CFR 10.123 (1981-1982)*[5]]. That it was sufficiently clear that a reasonable official, such as respondent, Injury Compensation Supervisor, Taquino, understood that what he was doing (i.e. intentionally

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[5] *20 CFR 10.123* (1981-1982) Employee's obligation to return to work or to seek work when able: When total disability to perform work ceases and the employee is able to perform a part of his usual duties, or to perform work of a different nature, the employee must seek such suitable work as he or she is able to perform, either in Government or private employment, unless it has already been provided for such employee, and shall accept such work or offer of work secured for him or her. An employee who has not been regularly employed during the period covered by such employee's claim, and who is only partially disabled, shall state in his or her claim what efforts he or she has made to obtain suitable employment giving the names and addresses of persons or concerns to whom the employee has applied for work. If the employee has not been offered or has not been able to secure work which he or she is able to do, he or she shall so state. If a partially disabled employee refuses to seek suitable work or refuses or neglects to work after suitable work is offered to, procured by, or secured for the employee, he or she shall not be entitled to any compensation.

giving petitioner erroneous appellate rights to appeal the suitability of the job offer) violated that right e.g. due process.

Assuming the petitioner's foregoing contentions are correct with regards to the statutory violation, then the Court is the one to decide whether the statute in question [(i.e. *5 U.S.C. 8106(c)(2)]* contains a clear command that the respondents, Taquino and U.S. Department of Labor has transgressed. See *Staacke v. U.S. Secretary of Labor, 841 F.2d 278, at 282 (9th Cir. 1988).* Petitioner contend the lack of determining the job offer suitability pursuant to *5 U.S.C. 8106(c)(2)* violates a clear statutory mandate or prohibition, especially, since the petitioner has suffered adverse effects such as loss of employment (i.e. being terminated), lost substantial wages (i.e. $83,579.59), and have not been made whole.

Also, evidence of record indicate that respondent, Secretary of Labor, conspired with respondents, U.S. Postal Service and Injury Compensation Supervisor, Barry J. Taquino, to withhold the proper appeal rights by intentionally lying to petitioner in order to avoid a determination of the job offer suitability. Respondent, Secretary of Labor, was aware that a job offer was made but lied by in dereliction of his duty to monitor a claimant with an on the job injury, (see e.g. Court of Appeals brief of petitioner, starting at p.16). As a result of this conspiracy, pursuant to *42 U.S.C. 1985(3),* petitioner was denied due process and equal protection of the laws pursuant to the *5th and 14th Amendment to the U.S. Constitution.* For a further discussion on petitioner's conspiracy claim and action for neglect to prevent a conspiracy pursuant to *42 U.S.C. §§ 1985-1986* see petitioner's Appeal Court's reply brief pp. 10-12.

The petitioner's intentional constitutional tort/Bivens type claim was expanded upon in petitioner's Appeal Court's

brief at pp. 10-16, Appeal Court's reply brief at 8 and his suggestion for rehearing or rehearing en banc pp. 7-15.

Once petitioner's constitutional tort become actionable because of the lack of notice requirement in the *Bush v. Lucas* analysis and the fact that all of the prohibited personnel practices the respondents have committed did not occur in an employer/ employee relationship, this petitioner wishes to exercise his option of demanding a jury trial pursuant to Fed. R. Civ. P. 38(B).

Again, I must address an error or misstatement of fact or law in this case as concluded by the panel for the Fifth Circuit Court of Appeals and must be addressed in respondent's brief in opposition in accord with Sup. Ct. R. 15. 2. The panel said in its decision of June 20, 1995, p.6 appendix A that:

> Congress has created a comprehensive and remedial scheme for aggrieved postal workers like Jenkins. See *39 U.S.C 1001-1011, 1201-1209; see Pereiva v. U.S. Postal Service, 964 F.2d 873, 875 (9th Cir. 1992).* All action taken by defendants in the instant case were personnel decisions arising out of Jenkins's relationship with the federal government. Jenkins cannot maintain an action for violation of his constitutional rights based on these alleged acts. see *Morales v. Dep't of Army, 947 F.2d 766, 769 (5th Cir. 1991).*

The petitioner alerted the panel in his suggestion for en banc rehearing at p.12 how respondent, U.S. Postal Service, on 2-11-91 invaded his privacy by illegally retrieving petitioners' credit report from the computers of the Equifax Consumer Reporting Agency at a time when the petitioner had a non-employment relationship with the U.S. Postal Service and was actually retired on OPM Disability Retirement. For a further

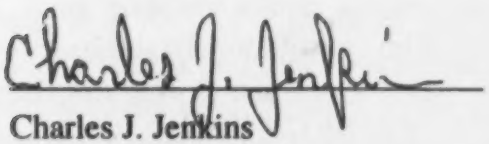
discussion on petitioner invasion of privacy claim see e.g. plaintiff-appellant suggestion for rehearing en banc starting at page 11. Discovery will show that the illegal retrieval of employees credit report is done routinely by the U.S. Postal Service and should be certified for the class pursuant to Fed. R. Civ. P. 23.

CONCLUSION

All of the issues mentioned above has been expounded upon throughout petitioner's memorandum, appellate brief, reply brief, suggestion for rehearing or rehearing en banc and now this petition for writ of certiorari. For the reasons set forth above, a writ of certiorari should be issued to review the judgment and opinion of the Fifth Circuit Court of Appeals in this matter or in the alternative reverse the lower courts' decisions and rule in favor of petitioner as a matter of law.

Dated: November 10, 1995

Respectfully submitted,



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United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

CHARLES F. FULBRIDGE
TEL. 504-589-6514
CLERK
600 CAMP STREET

NEW ORLEANS, LA 70130

June 20, 1995

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

Regarding: Fifth Circuit Statement on Petitions for Rehearing or Rehearing En Banc

NO. 94-30715 - Jenkins v. U.S.A., et al.

Enclosed is a copy of the Court's decision, and judgment has been entered under FRAP 36. (However, the opinion may yet contain typographical or printing errors which are subject to correction.)

FRAPs 39 through 41, and Local Rules (LR) 35, 39 and 41 govern costs, rehearings, and mandates. Please read carefully the Internal Operating Procedures (IOP) following FRAP 40 and LR 35 for a discussion of when a rehearing may be appropriate, the legal standards applied and sanctions which may be imposed if a nonmeritorious suggestion for rehearing en banc is made.

Direct Criminal Appeals. LR 41 provides that a motion for a stay of mandate under FRAP 41 shall not be granted simply upon request. The petition must set forth good cause for a stay or clearly demonstrate a substantial question is to be presented to the Supreme Court. Otherwise, the motion may be denied and the mandate issued immediately.

Pro Se Cases. If you were unsuccessful in the district court and/or on appeal, and will be considering filing a petition for certiorari in the United States Supreme Court, you do not need to file a motion for stay of mandate under FRAP 41. The issuance of the mandate does not affect the time, or your right, to file such a petition.

The judgment entered provides that plaintiff-appellant pay to defendants-appellees the costs on appeal.

Sincerely,

CHARLES R. FULBRUGE III, Clerk

/s/ Deborah M. Taylor
Deputy Clerk

Enclosure
Mr. Charles J. Jenkins
Mr. Glenn K. Schreiber
Ms. Janet E. Noble

FILED
June 20, 1995
Charles R. Fulbruge III, Clerk
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

94-30715
Summary Calendar

CHARLES J. JENKINS,
Plaintiff-Appellant

v.

UNITED STATES OF AMERICA, ET AL.,
Defendant-Appellee

Appeal from the United States District Court
For the Eastern District of Louisiana
(CA-93-3583-M-5)

Before SMITH, EMILIO M. GARZA, and PARKER, Circuit Judges.

PER CURIAM:*

Charles Jenkins ("Jenkins") appeals the dismissal of his claims against the United States Postal Service. We AFFIRM.

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* Local Rule 47.t provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

FACTS

On April 8, 1974, Jenkins injured his right knee during the course of his employment as a letter carrier with the U.S. Postal Service. The Office of Workers' Compensation Programs (OWCP) accepted Jenkins's claim for synovitis of the right knee. The OWCP also accepted, on several occasions, that Jenkins sustained recurrences of disability that were causally related to the 1974 injury. Following knee surgery in 1979, Jenkins worked in a limited-duty capacity.

On September 3, 1987, Jenkins filed a notice of occupational disease and claim for compensation for "work related stress-depression." He stated that he first became aware of his condition and its relationship to his employment in 1980, at which time he was advised by his doctor not to work because of stress, depression, and anxiety. Jenkins's doctor's report indicated that he felt harassed by his employer, that his reassignment to inside duties gave him claustrophobia, and that he had difficulty adjusting to working the night shift.

The OWCP initially denied this claim for compensation because Jenkins had failed to establish that his depression was causally related to his employment. Jenkins appealed to the Employees' Compensation Appeals Board, which remanded the case to the OWCP, with instruction to combine Jenkins's traumatic injury and emotional injury files in order to determine whether there was a psychological or emotional component to Jenkins's physical injury. On October 11, 1990, the OWCP accepted Jenkins's claim for compensation for disability resulting from an employment-related emotional illness. He received a payment from the OWCP for $40,858.94 for compensation owed, was placed on the OWCP's periodic compensation rolls, and continues to receive Federal Employees Compensation Act (FECA) benefits for wage loss and medical expenses.

On July 30, 1991, Jenkins sent a letter to the U.S. Department of Labor seeking back pay for the period from January 1, 1980, to August 15, 1987. He asserted that, in addition to the amount he had received from the OWCP, he was owed an additional $83,571.59. On October 11, 1991, the OWCP responded that Jenkins had already been compensated for all relevant periods of entitlement. On October 13, 1992, Jenkins sent a letter to the U.S. Postal Service, demanding that it pay the $83,571.59. On December 24, 1992, Jenkins amended his claim, seeking an additional ten million dollars because "extreme and outrageous" conduct by "Employer/Supervisors" had caused Jenkins to suffer additional emotional distress. The Postal Service responded on December 30, 1992, that Jenkins's claim for compensation during the applicable period had already been processed in accordance with the FECA.

On October 29, 1993, Jenkins filed the instant suit pursuant to the Federal Tort Claims Act (FTCA) and the due process clauses of the Fifth and Fourteenth Amendments, alleging that, upon his return to limited duty in 1979, he was subjected to a pattern of harassment, humiliation, and improper discipline by his supervisors which resulted in mental and emotional stress. The district court granted the defendants' motion to dismiss under FED. R. CIV. P. 12(b)(1), determining that Jenkins's claims were barred because the sole remedy available to him was under the FECA.

DISCUSSION

This court reviews a Rule 12(b)(1) dismissal for lack of subject-matter jurisdiction *de novo*. *Hobbs v. Hawkins*, 968 F.2d 471, 475 (5th Cir. 1992). The dismissal will not be upheld unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Id.

A. Federal Tort Claims Act

Jenkins contends that the FECA exclusive remedy provision does not bar this suit brought under the FTCA.

The FECA provides that the United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of his duty. 5 U.S.C. § 8102. Because it is intended to serve as a substitute for, rather than a supplement to a tort suit, the remedy of the FECA is the exclusive remedy against the United States for an injury within its coverage. *Bailey v. United States,* 451 F.2d 963, 965 (5th Cir. 1971); 5 U.S.C. § 8116(c). Thus, an individual who has received compensation benefits under the FECA is barred from suing the United States for that injury under the FTCA. *Grijalva v. United States,* 781 F.2d 472, 474 (5th Cir.), *cert denied,* 479 U.S. 822 (1986); *see also Benton v. United States,* 960 F.2d 19, 21 (5th Cir. 1992) (exclusive remedy provision of the FECA also bars claims for injuries which derive from a physical injury compensable under FECA). Moreover, the action of the Secretary of Labor in denying or granting compensation under the FECA is final and conclusive and may not be reviewed by a court of law. 5 U.S.C. §§ 8128(b)(1) & 2; *see Gill v. United States,* 641 F.2d 195, 197 (5th Cir. 1981).

The record reflects that Jenkins pursued a FECA remedy for his on-the-job emotional injury and received compensation for this claim. In his complaint, he seeks further compensation for this injury, alleging that he has been subject to harassment, humiliation, and improper discipline. However, the Secretary of Labor's determination that Jenkins's emotional injury falls within the ambit of the FECA is expressly "unreviewable by this or any other court." *Gill,* 641 F.2d at 197. Thus, Jenkins is barred from bringing this FTCA action by the exclusive remedy provision of the FECA.

B. Constitutional and civil rights claims

Jenkins also argues that the district court erred in "not allowing [him] to proceed with his constitutional and civil rights claims when those claims were not covered by FECA." To the extent that Jenkins is seeking damages from his supervisors for alleged due process violations in a *Bivens*[1]-type action, his claims are precluded.

In *Bush v. Lucas*, 462 U.S. 367, 390 (1983) the Supreme Court held that the Civil Service Reform Act (CSRA) was the exclusive remedy for a federal civil service employee who alleged that he was improperly demoted for exercising his First Amendment rights. The Court noted that "[f]ederal civil servants are now protected by an elaborate, comprehensive scheme that encompasses substantive provisions forbidding arbitrary action by supervisors and procedures—administrative and judicial—by which improper action may be addressed." *Id.* at 385. In *Rollins v. Marsh*, 937 F.2d 134, 138 (5th Cir. 1991), this court extended the preclusive effect of *Bush* to include violations of other constitutional rights.

Congress has created a comprehensive and remedial scheme for aggrieved postal workers like Jenkins. *See* 39 U.S.C. §§ 1001-1011, 1201-1209; *see pereira v. U.S. Postal Service*, 964 F.2d 873, 875 (9th Cir. 1992). All actions taken by the defendants in the instant case were personnel decisions arising out of Jenkins's relationship with the Federal Government. Jenkins cannot maintain an action for violation of his constitutional rights based on these alleged acts. *See Morales v. Dep't of Army*, 947 F.2d 766, 769 (5th Cir. 1991).

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[1] *Bivens v. Six Unknown Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971)

CONCLUSION

Accordingly, the dismissal of Jenkins's claims is AFFIRMED.

MINUTE ENTRY
BEER, J.
SEPTEMBER 27, 1994

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CHARLES JENKINS	•	CIVIL ACTION
VERSUS	•	NO. 93-3583
UNITED STATES OF AMERICA, ET AL.	•	SECTION M

Background

Plaintiff, Charles Jenkins, proceeding pro se, brought suit against the United States pursuant to the Federal Tort Claims Act (FTCA) and the due process clause of the 5th and 14 Amendments. Plaintiff seeks damages for intentional infliction of emotional distress by his employer/supervisor and perhaps for denial of due process and invasion of privacy.

Plaintiff was a postal service employee in 1979 when he suffered injury to his knee in the course and scope of his employment. His claim for compensation under the Federal Employees Compensation Act (FECA) was accepted by the Office of Workers Compensation Program (OWCP). Subsequently, plaintiff sustained a number of recurrences of disability caused by the 1979 injury which all were ultimately accepted by the OWCP as compensable.

On September 3, 1987, Jenkins filed a "Notice of Occupational Disease and Claim for Compensation" alleging that he

was suffering from job related emotional depression. He claimed that his emotional distress was caused by harassment from his supervisor who was unwilling to accommodate his physical limitations. His claim was ultimately granted and Jenkins is currently receiving FECA compensation for wage loss and medical benefits.

Defendant has now filed a Motion to Dismiss, contending that plaintiff's claim is barred because the July 30, 1991 letter does not fulfill the requirements of an administrative claim pursuant to 28 U.S.C.A. §2675(a). Alternatively, defendant maintains that plaintiff's claim is time barred because all incidents plead in his Complaint, except one, occurred prior to July 30, 1989 (assuming his letter meets the administrative requirements). Finally, defendant contends that plaintiff's exclusive remedy is under the FECA; thus, plaintiff cannot maintain a separate action under FTCA.

LAW AND ANALYSIS

A. 28 U.S.C.A. §2675(a).

§2675(a) provides that an action shall not be instituted against the United States under the FTCA, unless the claimant first presents his claim to the appropriate federal agency and that agency sends written notice of denial. 28 U.S.C.A. §2675(a) (West 1994). Defendant contends that plaintiff's letter is not sufficient notice under the statute. A claim is deemed presented when a Government Standard Form 95 or other written notification of an incident accompanied by a claim for money damages in a sum certain is executed and presented to the appropriate federal agency. The Fifth Circuit interpreted the statute as only requiring the claimant to 1) give written notice of the claim sufficient for the agency to investigate, and 2) place a value on the claim. Adams v. United States, 615 F.2d 284, 288 (5th Cir.),

clarified, 622 F.2d 197 (1980). Here, plaintiff submitted a letter to the OWCP. The letter contains a demand for a specific amount. This letter meets the minimal notice requirements of 28 U.S.C.A. §2675(a).

B. EXCLUSIVE REMEDY OF FECA

FECA states in part that:

> The liability of the United States ... with respect to the injury or death of an employee is exclusive and instead of all other liability of the United States ... to the employee ... because of the injury or death in a direct judicial proceeding, in a civil action, or ... under a Federal tort liability suit.

5 U.S.C.A. §8116(c)(West 1980). This program of workers compensation was intended not as a supplement to, but rather as a substitute for a tort suit. It is the exclusive remedy for injuries falling within its coverage. Burke v. United States, 644 F. Supp. 566 (E.D. La. 1986). Here, the Secretary has determined that plaintiff's emotional injury is cognizable under FECA. Plaintiff states in his brief that his claim is "based upon lost wages and back pay due to an unjustified or unwarranted personnel action committed ... while [plaintiff was] working in a job that defendant, U.S. Postal Service offered but [which] was never determined to be suitable by the U.S. Dept. of Labor...."

Plaintiff cannot rest his case on such a contention. Any injuries sustained while in the performance of the employee's duties, are covered by FECA. The Department of Labor has determined that plaintiff's injuries are FECA covered. Because plaintiff has his remedy under FECA and has in fact received compensation for his emotional injuries, this FTCA claim is barred.

C. PLAINTIFF'S CONSTITUTIONAL AND CIVIL RIGHTS CLAIMS

Plaintiff has also alleged in his Complaint violations of civil and constitutional rights. In Bush v. Lucas, 103 S. Ct. 2404 (1983) the Supreme Court noted that "federal civil servants are now protected by an elaborate, comprehensive scheme that encompasses substantive provisions forbidding arbitrary action by supervisor and procedures-administrative and judicial by which improper action may be redressed ... Constitutional challenges to agency action ... are fully cognizable within this system." Id. at 2415. Thus, any extraneous constitutional and civil rights violations alleged by plaintiff are encompassed within the FECA and are barred as a matter of law.

D. STATUTE OF LIMITATIONS

28 U.S.C. § 2401(b) provides that a tort claim against the United States shall be forever barred unless presented to the appropriate agency within two years after such claim accrues.

Defendant contends that plaintiff's earliest alleged FTCA claim was a July 30, 1991 letter to the Department of Labor, and thus, all claims accruing prior to July 30, 1989 are time barred by operation of §2401(b). Plaintiff contends that the harassment that is the subject of his claim is ongoing - the most recent incident occurring in the form of a letter from the Department of Labor requesting a medical update. Because plaintiff has no remedy under FTCA for his claims, this issue is moot.

Accordingly, for the foregoing reasons, IT IS ORDERED that defendant's Motion to Dismiss be and is hereby GRANTED.

Counsel for mover to prepare and submit a judgment consistent with this Minute Entry.

/s/ Peter Beer
United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-30715

CHARLES J. JENKINS,

Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the
Eastern District of Louisiana

ON SUGGESTION FOR REHEARING EN BANC

(Opinion (June 20, 1995), 5 Cir., ( ),
F.3d

(AUGUST 15, 1995)

Before SMITH, EMILIO M. GARZA and PARKER, Circuit Judges.

PER CURIAM:

(X) Treating the Suggestion for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor Judge in regular active service of the Court having requested that the Court be polled on rehearing en banc (FRAP and Local Rule 35), the Suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The Court having been polled at the request of one of the members of the Court and a majority of the Judges who are in regular active service not having voted in favor (FRAP and Local Rule 35), the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ ROBERT M. PARKER
United States Circuit Judge

FILED
September 22, 1995
Charles R. Fulbruge III, Clerk
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

94-30715

CHARLES J. JENKINS,
Plaintiff-Appellant

v.

UNITED STATES OF AMERICA, ET AL.,
Defendant-Appellee

Appeal from the United States District Court
For the Eastern District of Louisiana

ORDER :

(X) The motion of appellant for (X) stay ( ) recall and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

( ) The motion of appellant for (X) stay ( ) recall and stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including _____. The stay is in force until the

final disposition of the case by the Supreme Court, provided that the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed is also filed with this court within the time stated above. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of this stay unless the certificate is filed with the Clerk of this Court within that time.

/s/ROBERT M. PARKER
UNITED STATES CIRCUIT JUDGE

MDT-4
REV. 7/1/94

United States Court of Appeals
FIFTH CIRCUIT
OFFICE OF THE CLERK

CHARLES F. FULBRIDGE
TEL. 504-589-6514
CLERK
600 CAMP STREET

NEW ORLEANS, LA 70130

September 22, 1995

Ms. Loretta Whyte, Clerk
Eastern District of Louisiana
United States District Court
500 Camp Street, Room C-151
New Orleans, LA 70130

No. 94-30715 - JENKINS v. USA, ET AL.,

(D. C. No. CA-93-3583-M-5)

(X) Enclosed, for the District Court only, is a certified copy of the judgment issued as the mandate.

( ) Enclosed, for the District Court only, is a certified copy of the Local Rule 47.6 Decision issued as the mandate.

( ) Enclosed is a copy of the order denying the motion for stay of mandate.

( ) Enclosed, for the District Court only, is a certified copy of the judgment issued as the mandate.

( ) Supreme Court order denying certiorari has been received.

( ) Enclosed, for the District Court only, is a certified copy of the judgment issued as the mandate.

( ) The judgment issued as mandate was previously sent to your office.

(X) Enclosed, for the District Court only, is a copy of the Court's opinion.

(X) Record/original papers/exhibits are:

(1) Volume	(X) Returned	( ) To be returned
( ) Envelopes	( ) Returned	( ) To be returned
( ) Boxes	( ) Returned	( ) To be returned

Sincerely,

CHARLES R. FULBRUGE III, Clerk

By: /s/ Peggy Keller
Deputy Clerk

cc: (Letter Only)
Hon. Peter Beer
Mr. Charles J. Jenkins
Ms. Janet E. Noble

MDT-1

AMENDMENT V TO THE UNITED STATES CONSTITUTION

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV TO THE UNITED STATES CONSTITUTION

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. 1985(3) DEPRIVING PERSONS OF RIGHTS OR PRIVILEGES

If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engages therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C. 1986 ACTION FOR NEGLECT TO PREVENT

Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action; and if the death of any party be caused by any such wrongful act and neglect, the legal representatives of the deceased shall have such action therefor, and may recover not exceeding five thousand dollars damages therein, for the benefit of the widow of the deceased, if there be one, and if there be no widow, then for the benefit of the next of kin of the deceased. But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued.

UNITED STATES POST OFFICE

New Orleans, LA 70113-9998

DATE: August 5, 1987

OUR REF: SNDLL:EWM:JF:mbm::9403

SUBJECT: LETTER OF DECISION

TO: C. Jenkins
437-68-1661
F/T Dist. Clerk
Pay Location 191

On July 2, 1987, you were issued a notice, dated June 29, 1987, proposing to remove you from the Postal Service based on the charges outlined in the notice.

I have given full consideration to your written reply of July 11, 1987, and I note you did not reply in person. Full consideration was also given to all evidence of record. I find, however, that the charges as stated are fully supported by the evidence and warrant your removal. Concerning Charge 1, Tardiness - AWOL, the record indicates you were tardy in reporting for duty on eight (8) separate dates within a two (2) and a half (1/2) month period. Further, that you did enter into an agreement with the Postal Service on January 8, 1987, that you would serve a year probation for tardiness, and exceeding six (6) would be just cause for removal. Concerning Charge 2, Absent Without Leave (AWOL), I find that you were absent as charged on the dates indicated. When the charges are considered, either jointly or separately in conjunction with the elements of past record and the Settlement Agreement, removal is warranted to effect the efficiency of the

Postal Service. Your response of July 11, 1987, fails to present anything that would mitigate the charges.

In reaching this decision, I have considered the elements of your past record cited in the notice of June 29, 1987. I have also considered the nature and seriousness of the offenses, your past work and discipline records, the consistency of the penalty and the effect on the efficiency of the Postal Service. The removal will be effective August 14, 1987.

As a preferenced eligible, you have the right to appeal this decision in writing to Merit Systems Protection Board, 1100 Commerce Street, Dallas, Texas 75242 within 20 days from the effective date of this decision. If you appeal to the MSPB, you should state whether you do or do not wish a hearing and you should furnish me a copy of your appeal. For further information on appeals procedure, contact Mr. Joseph Falati, Labor Relations Representative.

Attached for your reference are a copy of the MSPB regulations and a copy of the appeal form.

Letter of Decision
C. Jenkins
August 5, 1987
Page -2-

If you appeal to the MSPB, you thereby waive access to any procedures under the National Agreement beyond Step 2 of the Modified Article 15 Grievance Arbitration Procedure.

You are entitled to a representative of your own choosing, throughout your appeal. You and your representative, if he or she is a U.S. Postal Service employee, shall be afforded a reasonable

amount of official time for preparation of your case if you and/ or your representative are otherwise in a duty status.

/s/ E. W. Waldemeyer
Acting Manager, GMF

Attachments: MSPB Rules and Regulations
MSPB Appeal Form

REDLER BROWN WILLIAMS ORTHOPAEDIC CLINIC
A PROFESSIONAL MEDICAL CORPORATION

IRVING REDLER, M.D.
1538 LOUISIANA AVENUE
G. GERNON BROWN, JR., M.D.
NEW ORLEANS, LOUISIANA 70115
JAMES T. WILLIAMS, M.D.
TELEPHONE 891-3726
GORDON P. NUTIK, M.D.

Administrator
JOY COYLE

JULY 17, 1980

MR. Barry J. Taquino
U.S. Postal Service
701 Loyola Avenue
New Orleans, LA 70113

Re: Mr. Charles J. Jenkins

Emp: U.S. Postal Service

Dear Mr. Taquino:

Mr. Charles Jenkins returned to this office for re-evaluation on July 15, 1980. The following report is furnished for your information.

The patient stated that he has returned to limited duty which entails standing for 2 hours and sitting 6 hours at the Post Office.

he stated that his job is that of filing magazines in alphabetical order and then forwarding new address for the subscriber to the publisher. he states that his job prior to his back problem was that of a mail carrier. He has been unable to return to mail carrier and has been placed at his present job. However, he states that at present, he is having pain both while sitting and standing. He is working from 5 P.M. until 1:30 A.M. He is apparently very upset about his being different from the normal routine that he had as carrier i.e. working from 6 A.M. to 2 P.M. He states that he receives relief from Percodan, Codeine, Talwin and other medications. He further stated that he has not worked since Saturday and is not interested in returning to work at present because of his pain.

PHYSICAL EXAMINATION:

Physical evaluation revealed a well-developed, well-nourished muscular male. The patient walked with a normal gait and was able to stand on his toes and heels without difficulty and walk on his toes and heels without any problem.

Range of motion of the spine was essentially normal with the patient reaching his fingertips to within 3 inches of the floor on forward flexion and to 2 inches distal to the lateral jointline of the knee bilaterally on lateral flexion. He had full backward extension. Neurologic examination was entirely within normal limits with normal muscle tone and motor strength measuring 5+ on all muscle groups tested. There was deep tendon reflexes with 2+ and equal bilaterally in lower extremities. Sensation was intact to pinprick and light touch. Examination of the muscles of the back revealed no spasm.

Mr. Charles J. Jenkins

There was no tenderness to either palpation or percussion over the spinous processes or paravertebral musculature. There was no measurable difference in thigh or calf circumference.

TREATMENT:

The patient was instructed to use heat in the form of hot showers and while in the hot shower to do forward flexion exercises with the knees extended. He was also instructed to continue using the exercise regime given to him by Dr. Williams. He was given a prescription for Percogesic tablets, 2 every 4 hours as needed for pain.

IMPRESSION:

Lumbosacral strain, chronic

The patient was further instructed to call back to the clinic on Monday afternoon to either myself or Dr. Williams to appraise us of his condition.

Yours very truly,

A. N. Diodene', Jr., M.D.

AND/cnl

Statement Enc.